Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1997

LARRY EVANS,

*Petitioner,*

v.

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada**

## PETITION FOR WRIT OF CERTIORARI

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26 pp

## QUESTIONS PRESENTED FOR REVIEW

### A

May the Constitutional and Statutory right to drive be taken away by the State for an alleged violation of the Nevada implied consent law without considering proof of the jurisdictional element – i.e., "actual operation of the vehicle"?

### B

Does NRS 484.383(1), as interpreted, authorize the seizure of a citizen on a standard of less than probable cause?

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## PETITION FOR WRIT OF CERTIORARI

LARRY EVANS ("Evans") respectfully prays that a writ of certiorari issue to review the judgment and order of the Nevada Supreme Court entered in this proceeding January 22, 1998, in order to prevent the State Department of Motor Vehicles and Public Safety [DMV] from forfeiting "Evans'" driver's license in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

## OPINIONS BELOW

The Decision of the Nevada Supreme Court that gives rise to this Petition is a published decision reversing and remanding with instructions. It is reprinted in Appendix 1 hereto ("App. 1").

## JURISDICTION

The jurisdiction of the Court is invoked pursuant to **28 U.S.C. Sec. 1257(3)**. Certiorari is available for " . . . any right. . . . claimed under the Constitution . . . ".

Review should be granted under Supreme Court Rule 10(c) because the Nevada Supreme Court decided an important federal question regarding the forfeiture of a driver's license of any person physically present in the State of Nevada.

## STATUTES INVOLVED IN THIS CASE

NRS 171.104

*Arrest defined; by whom made.*

An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

NRS 484.383(1)

*NRS 484.383 Driving under the influence of intoxicating liquor or controlled substance: Implied consent to evidentiary test; exemption from blood test; choice of test; circumstances in which peace officer may direct person to submit to blood test; restrictions on requiring urine test; failure to submit to test; notification of parent or guardian of minor directed to submit to test.*

1. Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

## STATEMENT OF THE CASE

The Petitioner, LARRY EVANS, hereinafter Evans, was arrested for driving under the influence of intoxicating liquor (DUI), and was requested to submit to an evidentiary test of his blood, breath or urine. Evans refused to submit to an evidentiary test. His Nevada driver's license was summarily revoked by the officer. "Evans" requested an administrative hearing.

A hearing was held on February 13, 1995, where "Evans" objected to hearsay evidence relating to the essential element of driving or operating a vehicle. Overruling the objection, the hearing officer upheld the revocation and "Evans" filed a petition for judicial review. The district court heard the matter and reversed the hearing officer decision based on "Evans" evidentiary objections relating to the element of driving. The Department of Motor Vehicles and Public Safety [DMV] filed an appeal to the Nevada Supreme Court. On appeal, the court reversed the district court judge holding that the element of driving is not an issue at the administrative hearing. The court's holding eliminated the threshold requirement for the administrative agency's jurisdiction. Further, the Nevada Supreme Court ignored the unconstitutionality of the implied consent law by also eliminating this issue from consideration at the license revocation hearing. In essence, the supreme court authorized the seizure of a citizen on a standard of less than probable cause. The instant request for relief has been filed in this Court.

## REASONS FOR GRANTING THE WRIT

A.

### I. PURSUANT TO THIS COURT'S DECISION IN *BELL V. BURSON*, INFRA, IT IS A DUE PROCESS VIOLATION TO ELIMINATE 'THE ELEMENT'[1] OF VEHICLE OPERATION FROM CONSIDERATION AT THE STATE LICENSE REVOCATION PROCEEDING.

#### a. The Nevada Supreme Court's ruling has a chilling effect on a citizen's right to remain silent, interstate travel and commerce.

Evans was requested to submit to an alcohol breath or blood test under the Nevada implied consent law. The police officer summarily revoked his driver's license for one year because he refused to submit. Evans requested an administrative hearing to challenge the legality of the revocation action. At the hearing, driving became an issue.

It is well settled that procedural due process guaranteed by the Fourteenth Amendment is applicable to administrative proceedings. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The United States Supreme Court has consistently held that the suspension of an issued driver's license involves state action which adjudicates important interests of licensees and, accordingly, licenses may not be revoked or suspended

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[1] The fact of "driving or actual physical control" is "THE ELEMENT" which triggers the Nevada implied consent law and gives the Nevada Department of Motor Vehicles and Public Safety jurisdiction to revoke the citizen's driver's license. See NRS 484.383(1), infra.

without due process. *Bell v. Burson*, 404 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Jennings v. Mahoney*, 404 U.S. 25, 92 S.Ct. 180, 302 L.Ed.2d 146 (1971). Procedural due process guarantees individuals the opportunity to be heard on relevant issues. *Bell v. Burson*, supra, 91 S.Ct. at 1591. Evans was denied the right to have a relevant issue addressed – the issue of driving.

In Nevada, the implied consent law is based and triggered on the premise that the person drove or was in actual physical control of a vehicle – the jurisdictional element. NRS 484.383(1) states in pertinent part,

> . . . ***any person who drives or is in actual physical control of a vehicle*** on a highway or on premises to which the public has access ***shall be deemed to have given his consent*** to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance. (Emphasis added.)

The purpose of the implied consent law is to get drunk driver's off the road. The Nevada Supreme Court made this point clear in *State Dep't Of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 874 P.2d 1247 (1994). The court said,

> This court has liberally construed the implied consent statutes to advance the goal of keeping drunk drivers off the streets. *State Dep't Of Mtr. Vehicles v. Kinkade*, 107 Nev. 257, 259, 810 P.2d

> 1201, 1202 (1991); *Ebarb*, 107 Nev. at 987, 822 P.2d at 1122. *Id.* at 477.

Since Nevada's implied consent law is only triggered by driving or being in actual physical control of a vehicle, evidence that the individual had actually operated the vehicle is clearly relevant. Again, it's jurisdictional. It is black letter law that a tribunal must have jurisdiction to lawfully act. In *Lane v. District Court*, 104 Nev. 427, 760 P.2d 1245 (1988), the court explained how jurisdiction is acquired.

> The general rule is that in order for a court to obtain jurisdiction of a particular matter, there must be an appropriate application by a person invoking the judicial power of the court and that application must be in proper legal form. 20 Am. Jur. 2d, Courts Section 94; 21 C.J.S., Court Section 81. *Id.* at 454.

Equally true, the decision of a tribunal entered without jurisdiction is void. The *Lane* court quoting *State, ex rel Preissler v. District Court*, 260 S.E.2d 279 (W. Va. 1979), said,

> Proceedings in a court which have not acquired jurisdiction as provided and recognized by law are void and a nullity. *Id.* at 454.

The Nevada Supreme Court's ruling in *Evans* makes jurisdiction a non-issue. This conduct cannot withstand a due process challenge.

After the district court had reversed Evans' revocation on the ground that the State failed to establish driving with competent evidence, the Nevada Supreme Court took away Evans' driver's license by holding that driving or being in actual physical control is no longer an element

of proof at the revocation hearing. Shockingly, the *Evans* court said,

> Second, the DMV was not required to prove that Evans was in fact driving or in actual physical control of a vehicle, ***only that the officer directing him to be tested had reasonable grounds to believe that Evans had been doing so*** while under the influence of alcohol. (Emphasis added.) *Id.* at p. 7 of Adv Opn.

The Nevada Supreme Court has now eliminated actual operation of a vehicle as an issue at the driver's license revocation hearing.[2] The logical result of its ruling is to illegally extend the reach of the implied consent statute to individuals who have consumed alcohol but have not driven a vehicle.[3] Equally true, by making actual operation of a vehicle a non-issue, it prevents that person from raising the driving issue at the state license revocation hearing. See *Beavers v. State Dep't Of Mtr. Vehicles*, 109 Nev. 435, 851 P.2d 432 (1993) (The validity of a person's arrest is not an issue in an administrative license revocation proceeding.) *Id.* at 438. An example can best illustrate the error in *Evans*, supra.

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[2] The Nevada Supreme Court in *State of Nevada, Dep't Of Mtr. Vehicles v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985) declined to hold that actual operation of a vehicle was irrelevant.

[3] The ruling in *Evans*, supra, has a far reaching effect. It concerns every driver who uses Nevada's roads. Interstate travel is surely affected. Individuals will be hesitant to travel in Nevada if they are subject to losing their driver's license for drunk driving without actually driving or being in actual physical control of their vehicle.

Suppose John Doe citizen has been consuming alcoholic beverages in his residence and decides to go out to his automobile for his brief case. As he is standing next to his vehicle and picking out the correct key, a policeman approaches. The officer smells the strong odor of alcohol, notices bloodshot eyes and observes John Doe to be unsteady in his stance. (The policeman will assume that John Doe just drove). The officer begins to question Mr. Doe about his drinking and possible driving. He declines to answer.[4] Now the police officer requests that John Doe submit to a breath, blood or urine test pursuant to the implied consent law. Mr. Doe refuses to submit. The officer summarily revokes his driver's license for the statutory penalty of one (1) year. John Doe requests an administrative hearing to challenge the propriety of the revocation. It is quite obvious that failure of the State to establish that John Doe was operating the vehicle while intoxicated should void the revocation action. But, under *Evans*, supra, the administrative law judge will be forced

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[4] A detainee is not required to answer any of the officer's questions. In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) the court said "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." 104 at 3150. The *Evans'*, supra, decision will have a chilling effect on the right to remain silent. A person will now be forced to respond to the officer's roadside questions in order to avoid a driver's license revocation. See also, *McCarthy v. Anderson*, 266 U.S. 34, 45 S.Ct. 15, 69 L.Ed. 158 (1942); (The privilege against self incrimination applies equally to civil proceedings "wherever, the answer might tend to subject to criminal responsibility him who gives it".) U.S. at 40.

to uphold John Doe's driver's license revocation – even though he never drove the vehicle! All the State is now required to prove is that the police officer had reasonable grounds to believe that John Doe operated his vehicle under the influence of intoxicating liquor.[5]

This Court has held that it is a due process violation to eliminate a material issue from consideration in a state initiated driver's license revocation proceeding. This Court in *Bell v. Burson*, supra, said,

> Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing. *Id.* at 541.

Equally true, Nevada cannot eliminate, consistently with due process, vehicle operation since the statutory scheme makes driving or being in actual physical control a necessary element before the implied consent law is triggered. Again, see NRS 484.383(1).

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[5] The Nevada Supreme Court has interpreted "reasonable grounds" under NRS 484.383(1) to mean a standard less than probable cause, thus making the implied consent law unconstitutional. This issue is more fully addressed in paragraph B, infra.

B.

## II. NRS 484.383(1), AS INTERPRETED, AUTHORIZES THE SEIZURE OF A CITIZEN ON A STANDARD OF LESS THAN PROBABLE CAUSE.

This Petition requires this Honorable Court to determine if NRS 484.383(1) authorizes the unconstitutional seizure of a person on a standard of less than probable cause. The Petitioner, Larry Evans, respectfully submits that this statute does authorize such a seizure, and is, therefore, unconstitutional.[6] NRS 484.383(1) states:

> 1. Except as otherwise provided in subsections 4 and 5, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substances for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of a police officer having ***reasonable grounds*** to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance. (Emphasis added.)

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[6] The court in *Evans* failed to address the merits of this issue stating in footnote 7 "the validity of Evans arrest is not an issue in an administrative license revocation proceeding, however, and it is not an issue in this appeal". Clearly, the Fourteenth Amendment due process guarantee makes the unconstitutional statute an issue.

The nature of chemical testing requires that the suspect be taken into custody and transported from the scene of his initial detention to one of the jail facilities before the test can be performed. Under Nevada law taking a person into custody, for any purpose, is an arrest. NRS 171.104 defines an arrest as, "the taking of a person into custody, in a case and in the manner authorized by law". Unless it is supported by probable cause, such an arrest is an unreasonable seizure under the Fourth Amendment. In *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) the Supreme Court stated, ". . . every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause". Also, in *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1974) the Court stated, "There is no question that a person is seized within the meaning of the Fourth Amendment when he is taken involuntarily to a police station, and that such a seizure is unreasonable unless it is supported by probable cause".

The Constitutional validity of NRS 484.383(1) therefore depends upon the definition of "reasonable grounds" as it appears in the statute. If this term has been defined as a standard of less than probable cause, the statute violates the Fourth Amendment's prohibition against unreasonable seizures.

In *State of Nevada, Department of Motor Vehicles and Public Safety v. Torres*, 105 Nev. 558, 779 P.2d 959 (1989), the supreme court defined the term reasonable grounds as it appears in NRS 484.383(1). In *Torres*, the Department appealed to the supreme court from a decision of the district court reversing a hearing officer's decision to

revoke Mr. Torres' driver's license. The district court judge found that Mr. Torres was not in actual physical control of his vehicle and that there was no probable cause to arrest him on the charge of driving while under the influence of alcohol. On appeal, the supreme court reversed the district court judge's decision holding that probable cause is not required before a person may be taken into custody for testing purposes. The court stated:

> We note that the District Court applied an incorrect standard in reaching its conclusion. NRS 484.383(1) provides that a police officer may direct the administration of a chemical test to determine the percentage of alcohol in the blood of the person to be tested if the officer has reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance. ***It is not necessary under this statute that probable cause for an arrest on a charge of driving while under the influence of alcohol be demonstrated.*** (Emphasis added.)

The *Torres* decision clearly states that reasonable grounds is a standard less than probable cause, and that a person can be taken into custody under this lower standard. Under this decision, NRS 484.383(1) is unconstitutional. The Fourth Amendment does not permit the state to take its citizens into custody, for any purpose, unless there is probable cause to arrest. Because Mr. Evans was taken into custody for testing purposes under the authority of this unconstitutional statute, he respectfully requests that the instant Writ of Certiorari be granted.

## CONCLUSION

The implied consent law in Nevada is based on a person either "driving or being in actual physical control" of a vehicle. If a person was not operating the vehicle, the implied consent law is not triggered. Therefore, it is a Fourteenth Amendment due process violation to eliminate "driving or being in actual physical control" as an issue at the state driver's license revocation proceeding.

The Nevada implied consent law authorizes an arrest for less than "probable cause" and is therefore unconstitutional. It is important to note that the Nevada Attorney General's Office concedes the point that a standard of less than probable cause is practiced in drunk driving cases. In its brief to the Nevada Supreme Court the Nevada Attorney General stated,

> However, probable cause is not required to effectuate a drunk driving ***arrest*** under Nevada's illegal per se laws. NRS 484.383(1) (Emphasis added.)

Nevada's highest court ignored the obvious constitutional violation by declaring it as a non-issue. They are wrong! Clearly, the instant request for relief should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF MOTOR
VEHICLES AND PUBLIC SAFETY,

Appellant,

vs.

LARRY EVANS,

Respondent.

No. 27947

(Filed Jan. 22, 1998)

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Appeal from an order of the district court granting respondent's petition for judicial review and reinstating respondent's driving privileges. Eighth Judicial District Court, Clark County; Donald M. Mosely, Judge.

*Reversed and remanded with instructions.*

Frankie Sue Del Papa, Attorney General, and Bridget A. Branigan, Deputy Attorney General, Carson City,

for Appellant.

John G. Watkins, Las Vegas,

for Respondent.

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OPINION

PER CURIAM:

On November 28, 1994, Las Vegas Metropolitan Police Officer Scott Lang arrested respondent Larry Evans ("Evans") for driving under the influence of intoxicating liquor, then advised Evans of the implied consent

law and asked him to submit to a blood or breath test. After Evans refused to be tested, Officer Lang served him with notice of revocation of his driving privileges. Evans requested an administrative hearing.

At the hearing on February 13, 1995, Officer Lang testified, over a hearsay objection, that he responded to the location where his partner, Officer Merrill Sage, had stopped a vehicle driven by Evans in an erratic manner.[1] Officer Lang testified he smelled alcohol on Evans' breath, and noticed this speech was slurred and his eyes were bloodshot. When Evans failed a horizontal gaze nystagmus test and refused to take any other field sobriety tests, Officer Lang arrested him. Officer Lang testified he advised Evans of the implied consent law by reading it from a standardized form, and that Evans refused to take any test. Evans did not testify at the hearing.

By written decision, the hearing officer overruled Evans' hearsay objection, citing NRS 51.075(1)[2] and the *State of Nevada, Dep't Of Mtr. Vehicles v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985); denied Evans' motion to dismiss based on various constitutional challenges; and upheld the license revocation. In support of revocation, the hearing officer found (1) Officer Lang had reasonable grounds

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[1] Evans' attorney objected to admission of the hearsay statement and its use to show that Evans was driving. The hearing officer noted the objection for the record, reserved ruling on it, and allowed the police officer to continue.

[2] NRS 51.075(1) provides: "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

to believe Evans was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor; (2) Officer Lang asked Evans to take an evidentiary test and warned him that a failure to submit would result in revocation of his driving privilege; and (3) Evans failed to submit to any test.

Evans petitioned for judicial review. The district court granted the petition, and determined the hearing officer erred in admitting hearsay evidence that Evans was driving. According to the district court, this evidence deprived Evans of his constitutional right to confront and cross-examine an adverse witness on an important fact. Consequently, the district court reversed the license revocation and ordered that Evans' license be reinstated. The Department of Motor Vehicles ("DMV") appeals

The DMV contends Officer Lang's hearsay statement that Evans was driving, according to Officer Sage, was admissible under *Kiffe*. Evans, on the other hand, contends that *Franco v. State of Nevada*, 109 Nev. 1229, 866 P.2 247 (1993), a criminal case, repudiates the rationale of *Kiffe*, and that hearsay can no longer be admitted under the general hearsay exception to prove that a DUI suspect was driving.[3]

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[3] Preliminarily, Evans challenges our jurisdiction over this appeal. He argues district courts have final appellate jurisdiction in cases arising in inferior tribunals, including administrative agencies, under article VI, section 6, of the Nevada Constitution. The contention is without merit. NRS 233B.150; *State Dep't Mtr. Veh. v. Bremer*, 113 Nev. 805, 942 P.2d 145 (1997). Because *Bremer* was decided after the briefs were filed in this case, we decline the DMV's request that we sanction Evans' attorney for raising this issue; however, we admonish

A license revocation hearing is a civil proceeding, not a criminal prosecution. *Beavers v. State, Dep't Mtr. Veh.*, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993). The hearing was limited to two issues: (1) whether Officer Lang, at the time he directed Evans to submit to an evidentiary test, had reasonable grounds to believe that Evans had been driving or in actual physical control of a vehicle while under the influence of alcohol, and (2) whether Evans failed to submit to a test. See id.; NRS 484.383(1); former NRS 484.387(2).[4]

*Kiffe* answers in the affirmative the question whether the hearsay statement at issue in this case was admissible. In *Kiffe*, as in this case, the officer who arrested the driver ("Kiffe") on a DUI charge and requested that he submit to an evidentiary test did not actually see Kiffe in the car; when the officer arrived at the scene to assist, Kiffe was already outside of the car. *Kiffe*, 101 Nev. at 730, 709 P.2d at 1018. The hearing officer admitted the assisting officer's hearsay statement that, according to the officer who made the traffic stop, Kiffe had been driving in an erratic

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Evans' attorney that a continued practice of raising this issue will not be well received in the future.

[4] At the time of these proceedings, former NRS 484.387(2) provided:

> The scope of the hearing must be limited to the issues of whether the person failed to submit to a test or, at the time of the test, had 0.10 percent or more by weight of alcohol in his blood or a detectable amount of controlled substance in his system. Upon an affirmative finding on any of these issues, the department shall affirm the order of revocation. Otherwise, the order of revocation must be rescinded.

manner. Relying upon the hearsay, the hearing officer found the assisting officer had reasonable grounds to believe that Kiffe was driving while under the influence of alcohol. *Id.* at 731, 709 P.2d at 1019.

In *Kiffe*, the district court granted a petition for judicial review on the ground that the hearsay evidence, though admissible, was insufficient to sustain the hearing officer's findings of fact. *Id.* We reverse the order of the district court and reinstated the hearing officer's decision. In doing so, we confirmed that the hearsay evidence was admissible under the general hearsay exception, NRS 51.075(1). We further confirmed that the hearsay was expressly admissible in the administrative revocation proceeding under NRS 233B.123(1)[5] because, under the circumstances, the evidence consisting of the first officer's statement to the second officer was of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs. Since substantial evidence, including the hearsay statement, supported the hearing officer's determination that Kiffe's license should be revoked, we concluded the district court erred by substituting its judgment for that the hearing officer. *Id.* at 723-33, 709 P.2d at 1019-20.

Here, the district court ruled the hearsay evidence that Evans was driving was not admissible. The court reasoned that: (1) a person appearing before an administrative body has a due process right to confront and

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[5] NRS 233B.123(1) provides, in pertinent part, that "[e]vidence may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs."

cross-examine adverse witnesses on material facts; (2) the issue of driving or being in actual physical control of a vehicle is an important fact at a DMV driver's license revocation hearing; and (3) following *Franco*, 109 Nev. at 1240, 866 P.2d at 254, hearsay can no longer be admitted under the general exception to the hearsay rule, NRS 51.075(1), when a party has a right of confrontation.

The district court's analysis is fundamentally flawed in two respects. First, *Franco*, a criminal case, did not overrule *Kiffe*, either expressly or by implication. *Franco*, 109 Nev. at 1236-40, 866 P.2d at 252-54, recognizes the long standing rule that otherwise admissible hearsay may need to be excluded to preserve a criminal defendant's constitutional right to confrontation.[6] This is not a criminal case, however, and *Franco* does not address the admissibility of hearsay in an administrative proceeding.

At the revocation hearing, Evans had a right to confront and cross-examine opposing witnesses "on any matter relevant to the issues." NRS 233B.123(4). As noted, the issues were limited to determining whether Officer Lang had reasonable grounds for directing Evans to submit to a test and whether Evans failed to do so. Evans was permitted to cross-examine Officer Lang on any matter relevant to these issues, including the reasonableness of the Officer's belief that Evans was driving.

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[6] The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI; see Idaho v. Wright, 497 U.S. 805, 813 (1990).

Second, the DMV was not required to prove that Evans was in fact driving or in actual physical control of a vehicle, only that the officer directing him to be tested had reasonable grounds to believe that Evans had been doing so while under the influence of alcohol. See *Beavers*, 109 Nev. at 4 38-39, 8 51 P.2d at 434; NRS 484.383(1). Though we declined in *Kiffe* to clarify precisely what the DMV must prove in a revocation proceeding, we now do so. As we explained in *State, Department of Motor Vehicles and Public Safety v. Frangul*, 110 Nev. 4, 6, 49, 867 P.2d 397, 399 (1994), a criminal arrest and prosecution for DUI is wholly independent of the DMV license revocation process. Here, the hearing officer properly relied upon the hearsay evidence in finding that Officer Lang had reasonable grounds to believe Evans was driving.[7]

The hearing officer's determination that Evans' license should be revoked is supported by substantial evidence in the record; consequently, the district court erred by excluding the hearsay evidence and substituting its judgment for that of the hearing officer on factual issues. See NRS 233B.135; *Kiffe*, 101 Nev. at 733, 709 P.2d at 1020.

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[7] Evans asserts NRS 484.383(1) is unconstitutional if "reasonable grounds" is interpreted to mean anything less than "probable cause." The validity of Evans' arrest is not an issue in an administrative license revocation proceeding, however, and it is not an issue in this appeal. *See Beavers*, 109 Nev. at 438-39, 851 P.2d at 434; NRS 484.387(2).

Accordingly, we reverse the order of the district court and remand with instructions to reinstate the revocation of respondent's driving privileges.

/s/ Springer, C.J.
Springer

/s/ Shearing, J.
Shearing

/s/ Rose, J.
Rose

/s/ Young, J.
Young

/s/ Maupin, J.
Maupin

Supreme Court, U.S.
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No. 97-1634

In The

# Supreme Court of the United States

October Term, 1997

LARRY EVANS,

*Petitioner,*

v.

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada**

## BRIEF IN OPPOSITION

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11 pp

## QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to an inquiry into an essential element of an administrative driver's license revocation proceeding.

2. Whether Nevada Revised Statutes 484.383(1) authorizes the arrest of an individual in violation of the individual's constitutional rights.

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**TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:**

Respondent State of Nevada, Department of Motor Vehicles and Public Safety, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Nevada filed herein by Petitioner, Larry Evans.

## I.

## STATEMENT OF THE CASE

Petitioner Larry Evans was arrested for driving under the influence of alcohol on November 28, 1994. In accordance with Nevada's implied consent law, Petitioner was asked to submit to an evidentiary test of his blood, breath or urine. Petitioner refused to be tested, so his driver's license was revoked in accordance with Nevada law. Petitioner requested an administrative hearing regarding the revocation of his driver's license.

At the hearing on February 13, 1995, the arresting officer testified, over a hearsay objection, that he responded to the location where his partner had stopped the vehicle, driven by Petitioner in an erratic manner. *See* Nevada Supreme Court Opinion, App. 2, attached to Petition. Petitioner also moved to dismiss the case on the grounds that Nevada's implied consent law is unconstitutional. *Id.* By written decision, the hearing officer denied Petitioner's motion to dismiss, overruled Petitioner's hearsay objection and upheld the revocation of Petitioner's driver's license. *Id.* The Nevada Supreme Court affirmed the hearing officer's decision.

Petitioner's request that this Court review the Nevada Supreme Court's decision is based on Petitioner's misconceptions regarding the Nevada Supreme Court's decision. Specifically, Petitioner states that the Nevada Supreme Court held: (1) the element of driving is not an issue at an administrative hearing regarding the revocation of a driver's license for driving under the influence of alcohol; and (2) an individual may be arrested for driving under the influence on a standard of less than probable cause. It is Respondent's position that the Nevada Supreme Court did not so hold. Therefore, the Petition for Writ of Certiorari should be denied, because it is not based on any important federal questions.

## II.

## REASONS FOR DENYING THE WRIT

### A. PETITIONER WAS NOT DENIED HIS RIGHT TO DUE PROCESS, BECAUSE THE NEVADA SUPREME COURT DID NOT ELIMINATE THE ELEMENT OF VEHICLE OPERATION FROM CONSIDERATION AT THE STATE LICENSE REVOCATION PROCEEDING.

The Fourteenth Amendment guarantee of due process requires that an individual, such as Petitioner, be given a meaningful opportunity to be heard before losing a driver's license. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970). Pursuant to the Nevada Administrative Procedures Act, Petitioner was entitled at his hearing to "call and examine witnesses, introduce exhibits, cross-examine opposing witnesses . . .

impeach any witness . . . and rebut the evidence against him." NRS 233B.123(4).

Petitioner's administrative hearing resulted from his driver's license revocation for refusing to comply with Nevada's implied consent law. The implied consent law states in relevant part:

> . . . any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of *a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor* or a controlled substance.

NRS 484.383(1) (emphasis added). Pursuant to the implied consent law, an individual is deemed to have given his consent to an evidentiary test for the alcoholic content of his blood or breath when a police officer has reasonable grounds to believe the individual was driving while under the influence of alcohol.

The hearing officer at Petitioner's administrative hearing found that the police officer who arrested Petitioner had reasonable grounds to believe Petitioner was driving while under the influence of alcohol. *See* Nevada Supreme Court Opinion, App. 2-3, attached to Petition. The Nevada Supreme Court affirmed this finding. *Id.* at App. 7. The court also noted that Petitioner had the

opportunity at his administrative hearing to question the police officer regarding the reasonableness of his belief that Petitioner had been driving. *Id.* at App. 6.

In his Petition, Petitioner states that he was denied the right to have the issue of driving addressed. *See* Petition for Writ of Certiorari, p. 5. To support his position, Petitioner cites *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). In *Bell*, this Court examined Georgia's statutory scheme which permitted Georgia to revoke an individual's driver's license after the licensee was involved in a car accident without any inquiry into the licensee's liability for the car accident. *Id.* at 402 U.S. 537-38, 91 S.Ct. 1588-89. This Court held that in order to avoid violating a licensee's right to procedural due process, Georgia was required to conduct "an inquiry limited to the determination whether there is a reasonable possibility of judgments . . . against the licensee" before the driver's license could be revoked. *Id.* at 402 U.S. 540, 91 S.Ct. 1590.

Similarly, Nevada requires an inquiry into a police officer's determination that he had reasonable grounds to believe an individual was driving or in actual physical control of a vehicle while under the influence of alcohol before the revocation of the individual's driver's license will be upheld. *See* Nevada Supreme Court Opinion, App. 7, attached to Petition. The Nevada Supreme Court has previously discussed the factors to be considered in analyzing whether a police officer had reasonable grounds to believe an individual was driving or in actual physical control while under the influence of alcohol. *See State of Nevada, Department of Motor Vehicles v. Torres*, 105 Nev. 558, 779 P.2d 959 (Nev. 1989).

Based on the foregoing, the Nevada Supreme Court has not eliminated vehicle operation from consideration at an administrative hearing regarding the revocation of an individual's driver's license, nor was the Petitioner denied the right to explore this issue at his hearing. Thus, Petitioner was not denied his right to procedural due process, and his Petition does not present an important federal question for this Court's consideration.

## B. NEVADA'S IMPLIED CONSENT LAW, NRS 484.383(1), DOES NOT AUTHORIZE AN ARREST ON A STANDARD LOWER THAN PROBABLE CAUSE.

Petitioner states that Nevada's implied consent law, NRS 484.383(1), is unconstitutional because it authorizes the seizure of a person on a standard lower than probable cause in violation of the Fourth Amendment. However, NRS 484.383(1) does not authorize the seizure of a person; rather, it provides that certain persons have consented to an evidentiary test at the direction of a police officer.

Nevada law provides both criminal penalties and a civil license revocation for driving under the influence of alcohol. When a police officer encounters a drunk driving suspect, Nevada's implied consent law deems that the suspect has consented to an evidentiary test under certain circumstances. If the test yields certain results, the suspect's driver's license may be revoked as a civil remedy to combat drunk driving. However, a suspect may also be arrested for the crime of driving under the influence of alcohol and subjected to criminal charges and penalties.

After Petitioner was encountered by a police officer, Petitioner was arrested for driving under the influence of alcohol. *See* Petition for Writ of Certiorari, p. 3. It is the Respondent's position that Petitioner was not arrested pursuant to the implied consent law, NRS 484.383, but rather pursuant to NRS 484.379, the criminal counterpart of NRS 484.383. This explains the Nevada Supreme Court's statement that Petitioner's arrest was not an issue at his administrative hearing or on appeal of his license revocation. *Id.* at App. 7, fn. 7.

Nevada's implied consent law is not an arrest statute; it is a consent statute that applies to all Nevada driver licensees. A license to drive on Nevada's roadways is a privilege. Certain requirements must be met in order to obtain a driver's license, and upon accepting a driver's license, the licensee agrees to abide by certain laws. One such law is the implied consent law, NRS 484.383, and it provides that any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access in Nevada is *deemed to have given his or her consent* to submit to an evidentiary test, when the test is administered at the direction of a police officer who has reasonable cause to believe that the person was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor. NRS 484.383(1).

In essence then, by accepting a driver's license, a driver in Nevada *agrees* to submit to evidentiary testing whenever a police officer has reasonable grounds to believe that he or she is driving under the influence. The implied consent refers not only to consent to be tested but also consent to be tested based upon reasonable grounds.

If an individual does not want to be subjected to such conditions, then he or she should not apply for, and cannot hold, a Nevada driver's license.

Nevada's implied consent law, NRS 484.383, does not authorize the arrest of an individual on a standard lower than probable cause, and Petitioner was not arrested under the authority of the implied consent law. Therefore, his Petition does not present an important federal question.

## III.

## CONCLUSION

Based upon the foregoing, the State of Nevada, Department of Motor Vehicles and Public Safety respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari, because the Writ does not present any important questions of federal law.

DATED this 7th day of May, 1998.

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## REPLY BRIEF

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## *EVAN'S* PREVENTS A PERSON FROM CHALLENGING JURISDICTION TO REVOKE HIS DRIVER'S LICENSE

### a. The Department's Opposition ignores the distinction between actual driving and a mere reasonable belief that the person was driving.

Petitioner Evans complains and alleges a constitutional violation because the State of Nevada has eliminated the jurisdictional element under the implied consent law from consideration at the administrative license revocation hearing. In short, a person can lose his driver's license for drunk driving even though he *never* drove the vehicle.[1] The Nevada Department of Motor Vehicles and Public Safety (hereinafter the "Department") argues that driving is still an issue because the State must show that the police officer had a reasonable belief that the person drove the vehicle while drunk. The Department's position ignores the difference between actual driving and a reason to believe that the person was driving.[2] The latter can exist without the former ever occurring. A reading of *Evans* shows that the jurisdictional element (driving), has been eliminated as an issue. In Nevada an individual can lose his driver's license for drunk driving when he never drove. Such conduct chills the right to travel and is harmful to interstate commerce. For example, tourists and commercial drivers from other

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[1] Since the *Evan's* court has held that proof of driving is a non-issue, jurisdiction can never be raised or challenged.

[2] The Nevada implied consent is triggered only if the individual is driving and while doing so is under the influence of intoxicating liquor.

states are equally subjected to Nevada's driving laws. This Court mut grant the instant Writ of Certiorari and more fully examine the issue presented by Petitioner Evans.

**NEVADA'S IMPLIED CONSENT LAW, AS INTERPRETED, AUTHORIZES THE SEIZURE OF A CITIZEN ON A STANDARD OF LESS THAN PROBABLE CAUSE, A VIOLATION UNDER THE UNITED STATES CONSTITUTION.**

The Department's Opposition takes the position that Nevada licensed drivers' have agreed under the implied consent law to give up their Fourth Amendment protection not to be subjected to a "search" and "seizure" absent probable cause. This position is in error for several reasons. First, a person cannot be forced or coerced to abandon a constitutional right to be allowed to travel in and outside Nevada. See *Shapiro v. Thompson*, 394 U.S. 618 (1969), where the court stated,

> MR. JUSTICE STEWART said for the Court in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):
>
> > The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
> >
> > . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any

> event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

This Court went on further to say,

> If a law has
>
> > no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.
>
> *United States v. Jackson*, 390 U.S. 570, 581 (1968).

Second, the Department fails to address out of state drivers. Persons issued a drivers' license from the other forty-nine (49) states did not agree to give up their Fourth Amendment protection. Lastly, the Department argues that Nevada's implied consent law does to concern arrests.

> Nevada's implied consent law is not an arrest statute; it is a consent statute that applies to all Nevada drivers' licenses.
>
> Respondent's Opposition Brief, page 6.

This position is meritless. Section 3 of NRS 484.382 (part of the implied consent law) states,

> 3. If the person fails to submit to the test, the officer shall seize his license or permit to drive as provided in NRS 484.385, and if reasonable grounds otherwise exist, *the officer shall arrest him* and take him to a convenient place for the administration of an available evidentiary test under NRS 484.383.

The Nevada implied consent law authorizes a police officer to arrest the individual upon "reasonable grounds" to

obtain an evidentiary test under NRS 484.383. We already know that "reasonable grounds" in Nevada means a standard less than probable cause. *State of Nevada, Department of Motor Vehicles v. Torres*, 105 Nev. 558, 779 P.2d 959 (1989). The *Evans* decision affects every driver, whether Nevada citizens or others, on Nevada's roads and highways. A more thorough look at the issue raised here is clearly appropriate. The instant Writ of Certiorari must be granted.

## CONCLUSION

Nevada's implied consent law is triggered only if a person drove and the police officer had reasonable grounds to believe that the driver was under the influence of intoxicating liquor. Driving is a jurisdictional element. It is black letter law that jurisdiction can be challenged at any time. See *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). *Evans* eliminates jurisdiction from consideration, a clear due process violation.

Equally important, Nevada's implied consent law violates the United States Constitution because it allows a "search" and "seizure" on less than probable cause. The instant Writ of Certiorari must be granted.

Respectfully submitted,

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